

DRUGGED DRIVING CONFERENCE

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Common Challenges in DRE cases

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Common Challenges and Defenses in DRE Cases

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1



Nine Ways to Attack a Drug Recognition Evaluator On Cross-Examination

August 20, 2014 / in DUI / by Travis Hise

Driving under the influence of drugs is the new frontier in impaired driving regulation. Your clients may be examined by a Drug Recognition Evaluator (DRE) who will be a key prosecution witness. In this excerpt from *Innovative DUI Trial Tools*, author Bruce Kapsack shows you the nine major areas on which to attack a DRE during cross examination with examples to demonstrate the point.

2

GENERAL TIPS

- Anticipate defenses & challenges
 - Be the defense attorney
 - Get a second set of eyes
 - Review disclosed defenses, witnesses & evidence
 - Talk your case over with other DREs

3

WHAT IS A DRE? DRUG RECOGNITION EXPERT

- “An individual who successfully completed all phases of the DRE training requirements for certification established by the IACP and NHTSA”

4

DRUG INFLUENCE EVALUATION

“A process of systematically examining a person suspected of being under the influence of a drug, for the purpose of ascertaining what category of drugs (or combination of categories) is causing that person’s impairment. A trained DRE can identify, with a high degree of reliability, the distinguishing signs and symptoms of seven broad categories of drugs.”

5

INDICATOR S CONSISTENT WITH DRUG CATEGORIES							
	CNS Depressant	CNS Stimulants	Hallucinogens	Dissociative Anesthetics	Narcotic Analgesics	Intoxinants	Cannabis
	Present	None	None	Present	None	Present	None
	Present (High Dose)	None	No	Present	None	Present (High Dose)	None
LOC	Present	None	None	Present	None	Present	Present
Pupil Size	Normal (1)	Dilated	Dilated	Normal	Constricted	Normal (4)	Dilated (6)
Reaction to Light	Slow	Slow	Normal (3)	Normal	Little to no reaction	S	Normal
Pulse Rate	Down (2)	Up	Up	Up	Down	Up	Up
Blood Pressure	Down	Up	Up	Up	Down	Up/Down (5)	Up
Body Temperature	Normal	Up	Up	Up	Down	Up/Down/Normal	Normal
Muscle Tone	Flaccid	Rigid	Rigid	Rigid	Flaccid	Normal or Flaccid	Normal

FOOTNOTE: These indicators are consistent with the category, keep in mind there may be variations due to individual reaction, dose taken and drug interactions.

(1) Some Qualitatives and possibly some antidepressants usually dilate pupils.
 (2) Qualitatives, EDs and some antidepressants may cause slowing.
 (3) Certain psychedelic amphetamines may cause slowing.
 (4) Normal but may be dilated.
 (5) Down with alcohol, up with stimulants and acetaminophen.
 (6) Pupils possibly normal.

6

WHAT KIND OF WITNESS?

- ◉ Fact Witness
 - Did they do a DRE on your case?
- ◉ Cold Expert
 - Can they generally educate your jury?
- ◉ Expert Opinion
 - Do they have an opinion of impairment
(Will that opinion be allowed? See 702)

7

GENERAL TIPS

- ◉ Know Your Report/Case
- ◉ Review DRE Materials Prior to trial/interview
 - Look at/use the matrix
 - Research the specific drugs
- ◉ MEET WITH YOUR EXPERTS
- ◉ Listen Carefully to the Answers
 - May need follow-up

8

GENERAL TIPS

- ◉ Think the defense ploy through
 - Does it affect reliability or impairment?
 - Is it merely a diversion?
 - Do you have an objection?
 - Do the defense arguments work against each other?

9

OBJECTIONS?

- ◉ Prepare these ahead of trial
 - Review the Notice of Defenses
 - File motions in limine
- ◉ If you're totally surprised by a defense tactic- its probably because it's garbage

10

DON'T ALLOW THE DEFENSE TO CONTROL THE FOCUS

- ◉ Defense often tries to focus on noise
 - the reason for the impairment
 - Medication is for diseases - who cares
 - Attacks on the program/observations
- ◉ Focus on the decision to drive while impaired
- ◉ Focus on the impairment

11

REMINDERS

- ◉ Defense attorneys may not cross-examine in chronological order
 - To try to keep you & officer off balance
 - Prepare new officers for this
- ◉ Do not assume the ploy/question has any merit
- ◉ Don't accept their language

12



13

INCONSISTENT OBSERVATIONS

● Attack

- Civilians, first responders/stop officer and/or DRE observed different things

● Response

- Not uncommon in DUI drug cases - symptoms change over time
- May be due to poly drug use
- Stress consistency with type of drug(s)

14

INCONSISTENT OBSERVATIONS

● Response (cont.)

- Create a timeline - look for changes
- Emphasize impairment & consistencies
- Witnesses are not in same position - role, concerns and training
- **DRE has much more training & tools**
- Inconsistencies may be symptoms of the particular drug
 - Mood swings, half-lives, etc.

15

SOME OBSERVATIONS DO NOT FIT IN THE MATRIX

● Attack

- Some of the observations the DRE officer made during the 12 step evaluation are inconsistent with what is expected for the drug category

● Response

- It happens in DUI drug cases
- May be due to poly drug use/down-side
- Stress the consistencies & impairment
 - Was officer's call correct? If yes - emphasize
- Work together & explain the inconsistencies

16

SOME OBSERVATIONS DO NOT FIT IN THE MATRIX - EXAMPLE

● Attack

- Officer called depressants, but Defendant's blood pressure & pulse rate were elevated

● Response

- Be Proactive - anticipate
- May be homeostasis
- Defendant was obviously impaired
- Defendant is not exhibiting the symptoms of impairment today that the officer saw
- Admissions, pills, etc.

17

MISSING SIGNS & SYMPTOMS

● Attack

- Defendant does not exhibit all possible signs & symptoms of the drug category
- Looks at what defendant did right - focuses on what is missing

● Response

- It is uncommon to have every symptom - just like alcohol
- Not everyone has exactly same reaction

18

MISSING SIGNS & SYMPTOMS

- ◉ Response, cont.
 - Effects may differ due to tolerance, dose, type of drug & context
 - Poly-drug use may be a factor
- ◉ Totality of Circumstances
 - Emphasize signs & symptoms that were basis of law enforcement's opinion
 - Emphasize impairment
 - Emphasize correct drug calls

19

DRE DOES NOT KNOW SUSPECT'S NORMAL VITAL SIGNS

- ◉ Attack
 - The officer does not know what the defendant's vital signs are
 - Defendant may have high blood pressure, a naturally low/high temp., nervousness caused the rapid pulse, etc.
 - Uses this to explain observations

20

DRE DOES NOT KNOW SUSPECT'S NORMAL VITAL SIGNS

- ◉ Response
 - Matrix is based on known normal ranges
 - Doctors rely on these also
 - The vital sign is only one factor
 - Totality of the circumstances
 - Emphasize impairment
 - Emphasize consistency with drug category
 - Officer was correct

21

THE MARIJUANA IMPAIRED DRIVER DID NOT LOOK LIKE A "DRUNK"

◉ Attack

- My client did not appear impaired
 - Did well on the one leg stand and walk & turn, etc.



22

THE MARIJUANA IMPAIRED DRIVER DID NOT LOOK LIKE A "DRUNK"

◉ Response

- Marijuana impairment often looks different than alcohol impairment
 - Impaired perception of time & distance, paranoia, disoriented
- Use the matrix. Impairment symptoms are different for different drugs.
- Have the DRE explain how the defendant's appearance/symptoms are consistent with cannabis

23

PEOPLE DRIVE BETTER ON MARIJUANA

◉ Attack

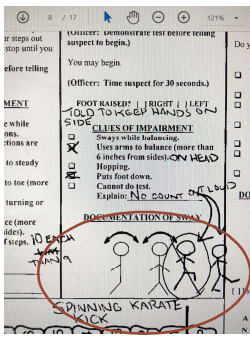
- These studies, my expert, TV all say marijuana does not really impair driving. Marijuana drivers actually drive safer.

◉ Response

- Explain what marijuana/cannabis impairment looks like
- Emphasize impairment
- Know & challenge the studies
 - AZ Study 1994 - Marci Burns, S. California Research Institute, Table 7, p.42 DRE IS 90% CORRECT IN IDENTIFYING FOR MJ

24

MARIJUANA IMPAIRMENT IS DIFFERENT THAN ETOH



- Remember FSTS show physical AND COGNITIVE impairment
- Is their judgement impaired??
- Also, how is the jump kick??

25

INVESTIGATE & QUESTION THE DEFENSE STUDIES

COLLECT, LEARN & USE THE VALID STUDIES

COMMUNICATE DIFFERENCES THEN & NOW

AVERAGE THC:

1983: <4%

2007: 7.3%

2008: 10.1%

2014: UP TO 33%

26



FIELD SOBRIETY TEST ISSUES

27

FIELD SOBRIETY TEST ISSUES

● Attack

- The DRE duplicated the SFSTs because the arresting officer did them incorrectly and he did not trust him

● Response

- DRE testing is done in a controlled environment
- DRE makes an independent opinion
- DRE performs additional tests
- DRE, not stop officer, is the expert

28

TOO MANY SFSTs?

● Response (cont.)

- Second set of SFSTs will give better picture of a poly-drug user or cycle of impairment
- DRE is following the DRE protocol
- Defense is arguing we have too much evidence

29

WRONG ORDER/MISSING DRE STEPS

● Attack

- DRE protocol is systematic and standardized. It must be conducted completely & in correct order or studies do not apply & we can't rely on it.

● Response - wrong order

- Focus on DRE's reason for doing it out of order or not doing steps
- Manuals now allow for incomplete evaluations
 - Disclose manuals? Disclose DRE instructors who will support?

30

WRONG ORDER/MISSING DRE STEPS

Response

- Symptoms of impairment are still there - does not eliminate them
- What could go wrong if not done in the normal order
 - Use jury/judge's common sense
- Call defense on "smoke & mirror" arguments
- Discuss toxicological confirmation (if have)

31

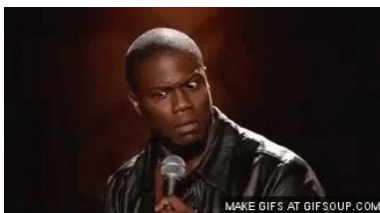
FST'S VALIDATED FOR ETOH ONLY NOT DRUGS

Attack

- FSTs were validated for alcohol
- They were not validated for drugs
- Therefore, they are not relevant in a drug dui case and DRE cannot talk about them

32

FST'S VALIDATED FOR ETOH ONLY NOT DRUGS



33

FSTS VALIDATED FOR ETOH ONLY NOT DRUGS

● Response

- FSTS validated with alcohol TO SHOW IMPAIRMENT
 - DRUGS ARE IMPAIRING
- ETOH is a CNS DEPRESSANT - One of the 7 Drug Categories Your DRE will testify about
- FST's included in DRE Studies- validated for 7 drug categories. All 7 were studied and validated

34

FST'S VALIDATED FOR ETOH ONLY

● RESPONSE CONTINUED

- Study: DRE Recognition Expert Examination Characteristics of Cannabis Impairment by Rebecca L. Hartman, et al (July 2016)
 - Finger to nose with over three misses is the best indicator. EYELID TREMORS ALONE AN 86.1% CORRECT PREDICTOR.
 - FTN over 3 misses, eyelid tremors, One Leg Stand SWAY, 2 Walk and turn cues, If any 2/4 then person is impaired

35

THE DRE IS JUST A COP

● Attack

- Officer has no medical expertise or training

● Response

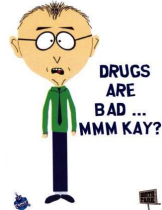
- Focus on DRE's (officer's) training
- Focus on DRE's (officer's) experience - life & field
- Point out how extensive protocol is
- DRE was correct!

36

REAL EXPERTS KNOW HOW & WHY DRUGS CAUSE CERTAIN EFFECTS

Attack

- DRE cannot be a real expert if he can not explain how a particular drug works in the body



37

REAL EXPERTS KNOW HOW & WHY DRUGS CAUSE CERTAIN EFFECTS

Response

- Often no one knows how various drugs work, even doctors who prescribe them - **look at PDR**
- Focus on common signs & symptoms
- Officers see effects of drugs on people more than just about anyone else in society - use their experience
- A lay person does not know how alcohol works, but can tell if someone is impaired by it
- Use judge's/juror's common sense - they know drugs impair

38

ALTERNATIVE EXPLANATIONS

Attack

- Other factors - fatigue, medical condition, a crash, or mental illness caused symptoms officer/DRE saw

39

ALTERNATIVE EXPLANATIONS

Response

- Not a challenge to observations, but the cause
- 12-step process is designed to eliminate other explanations
- Other factors may explain a few but not all signs observed
- Defense has lots of explanations - we have one
- Paraphernalia, drugs were found
- Admissions
- Did defendant tell officers she was injured, tired, etc.?

40

FATIGUE

Get Dr. Citek's fatigue study

- Won't cause HGN
- Officer's do not mistake fatigue for impairment
 - Won't make the wrong decision

Won't impact most of the protocol

Won't cause most signs & symptoms

Use officer's experience

- Has seen fatigue, takes it into account & can tell the difference

41

MENTAL ILLNESS OR MEDICAL CONDITION

Mental illness

- Focus on physical impairment & tox results

Medical condition

- Focus on mental impairment & physical that would not be affected by med. condition & tox

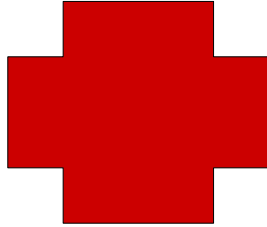
In DRE cases - clinical signs are very helpful

Compare to current appearance (& behavior) in court

Evaluate the type of drug(s) in system

42

EMPHASIZE MEDICAL RULE OUTS!



43

RUSH TO JUDGMENT

● Attack

- Officer/DRE had preconceived idea suspect was under the influence & only looked for evidence to support this
- Variation - Opinion was only based on admission to drug use, pill bottle, paraphernalia, etc.



44

RUSH TO JUDGMENT

● Response

- Emphasize investigative steps taken to minimize possibility of a bad arrest
 - Medical rule outs
- DRE is a standardized in depth investigation which asks numerous questions about health & medication
- Remind judge/jury how extensive testimony was
- Another DRE would come to same conclusion
- There is A LOT of objective evidence

45

RUSH TO JUDGMENT

- ◎ This attack does not make sense if one looks at all factors:
 1. Impaired driving
 2. Odor
 3. Physical signs - objective evidence
 - ❖ Not there because officer wanted to find them
 4. Drugs/paraphernalia found on scene
 5. Admissions

46

DRUG CATEGORIZATION SCHEME

- ◎ Attack
 - The Seven categories have no basis in science & are made up by DREs
 - Law enforcement must identify specific drug, not a category

47

DRUG CATEGORIZATION SCHEME

- ◎ Response
 - Seven categories are created based on observable & documented signs & symptoms
 - Not expected in an alcohol case - cant distinguish beer, wine, liquor
 - Distinguishing between drugs in a category would be nearly impossible because many drugs exhibit the same signs & symptoms
 - DRE protocol has been studied & proven valid
 - Drugs are commonly categorized by medical field, labs, medical treatises

48

NO MIRANDA BEFORE DRUG EVALUATION

◎ Attack

- Evaluation should be suppressed
 - *Miranda* warnings were not given prior to administration of evaluation
 - & defendant was not told tests would be used against him



49

NO MIRANDA BEFORE DRUG EVALUATION

◎ Response

- *Miranda* is a step in 12-step DRE protocol
- DRE should consult with arresting officer to ensure it was done before any questioning
- Educate officer if not done
- Don't have to tell defendant how we will use the tests

50

NO MIRANDA BEFORE DRUG EVALUATION

◎ Response

- *Miranda* warnings do not have to be repeated. *State v. Trostel*, 191 Ariz. 4, 951 P.2d 851 (1997).
 - So if they were ever read, you are OK
- Most of DRE process should be treated same as SFST battery under the law, i.e., as non-testimonial. *State v. Theriault*, 144 Ariz. 166, 696 P.2d 718 (App. 1984).
 - *Miranda* should not be required for any of the protocol except some of the questions and answers

51

DRE'S OPINION IS SUBJECTIVE OR A GUESS

- ◉ Attack
 - DRE guessed right this time
- ◉ Response
 - DRE was right!
 - Even defense admits it
 - DRE logs - accuracy
 - Toxicology confirmed the DRE's opinion
 - Emphasize objective evidence supporting DRE's opinion

52

DAUBERT/RULE 702 CHALLENGES

- Defense will at time argue DRE does not meet *Daubert*/Rule 702
- Often just trying to intimidate prosecutor

53

DAUBERT/FRYE TYPE CHALLENGES

- ◉ All Appellate Courts Have Upheld DRE
 - See, *State v. Daly*, 278 Neb. 903 (Neb. 2009) for list of opinions
 - Still need to take these seriously - prepare
 - Contact TSRP
- ◉ Rule 702 will not apply to most of the protocol - it is akin to FSTs
 - *State v. Superior Court (Blake, RPI)* 149 Ariz. 269 (1986).

54

DAUBERT/FRYE TYPE CHALLENGES

- ◉ **Remember:** expert can normally be qualified through knowledge, skill, experience, training or education
 - DREs have an abundance of this
- ◉ Use officer's personal **experience**
- ◉ Call state coordinator; instructors; lab personnel (national experts)
- ◉ Use medical resources

55

KNOW & USE THE STUDIES

- ◉ John's Hopkins- Lab Validation
- ◉ 1986 LA DRE Field Evaluation (aka the LAPD-173 study)
- ◉ 1994 Arizona DRE Validation Study

56

DRUG RECOGNITION EXPERT (DRE) EXAMINATION CHARACTERISTICS OF CANNABIS IMPAIRMENT

Hartman, Richman, Hayes, & Huestis

Good support for use of DRE in cannabis cases

57

DEFENDANT CLAIMS HOSPITAL/MEDICAL PERSONNEL TOLD HIM/HER IT WAS OK FOR HIM/HER TO DRIVE

- ◉ Object to hearsay
- ◉ Emphasize impairment, the collision, etc.
- ◉ Use the drug warnings
- ◉ Did the defendant tell the officer this on the DOV?
- ◉ Contact hospital - likely will dispute the claim

58

DOCTOR'S NOTE....

To whom it may concern:

Mr. [REDACTED] and his attorney [REDACTED] asked me to put the following in writing:

At the time of the auto accident he was taking the following medicines: Prozac, Xanax, and Prosom.

There is no history of him abusing these medicines.

He takes Xanax in the day time for anxiety and the Prosom (another benzodiazepine type medicine) in the evening; he doesn't mix them up. He takes them as prescribed. I do not think the medicines impair his driving. We regularly go over the meds for hazards and side effects. Mr. [REDACTED] reports he is alert and OK in the day time including his ability to drive.

Sincerely,

[REDACTED], M.D. [REDACTED]

59

HOSPITAL GAVE DEFENDANT IMPAIRING DRUGS BEFORE THE BLOOD DRAW

- ◉ Have forensic scientist identify which drugs were in the defendant's system that were not administered by the hospital
 - Purely illegal drugs never are
- ◉ Identify impairment, etc.

60

RESOURCES ARE AVAILABLE

CALL IN THE EXPERTS: THE DRUG RECOGNITION
EXPERT PROTOCOL AND ITS ROLE IN EFFECTIVELY
PROSECUTING DRUGGED DRIVERS

Gregory T. Seiders*

TABLE OF CONTENTS

I. INTRODUCTION	229
II. THE DRE PROTOCOL	232
III. ADMISSIBILITY OF DRE PROTOCOL AS EXPERT TESTIMONY 241	
A. <i>Admissibility of DRE Protocol under Frye</i>	242
i. Not Scientific and <i>Frye</i> Inapplicable	244
ii. Scientific and Satisfies <i>Frye</i>	246
B. <i>Admissibility of DRE Protocol under Daubert and Kumho</i>	
Tire	248
i. Scientific Approach	253
ii. Technical Approach	255
IV. SOLUTION	259
A. <i>Emphasize the Reliability of the DRE Protocol</i>	260

61

THANK YOU!

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62
